

## APPENDIX E

### CLAIMS AND REQUESTS FOR EQUITABLE ADJUSTMENT

1. Contract Clauses. The Contract Clauses defined below are those that are most commonly referenced in the administration of the disputes filed against the government on construction contracts.

a. Disputes (FAR 52.233-1). This clause allows the contractor to file a claim if there is a dispute with the Government's interpretation of the contract requirements.

b. Certification of Claims and Requests for Equitable Adjustment (REA). (FAR 52.233-1 & DFARS 252.233-7000). These clauses state that any contract claim or a request for equitable adjustment over \$100,000 shall include certification that the claim or REA is made in good faith, that the supporting data is complete and accurate, and that the amount requested reflects the amount for which the contractor believes the government is liable. The certification shall also include a statement verifying that the signer of the certification is authorized to sign on behalf to the contractor.

2. Definitions.

a. Claim. A claim under this clause, is a written demand by the contractor seeking compensation in a sum certain, or an interpretation or adjustment of the contract terms as a matter of right. A written demand or assertion by the contractor seeking the payment of money exceeding \$100,000 is not a claim until certified.

b. Request for Equitable Adjustment(REA). This is different than a claim in that it is a request, not a demand and does not request a decision by the Contracting Officer. It is usually filed with the ACO for an interpretation by the construction field office. As specified in DFARS, a request for equitable adjustment does not have to be certified unless it's over \$100,000.

c. Unabsorbed Overhead. Fixed home office expenses (i.e., rent, utilities, labor, etc.) which the contractor continues to incur during a suspension of work where it has been directed to standby. In order to recover these costs, the contractor must establish that the suspension was caused by the Government, that it incurred the expenses claimed that it had been directed to standby, and that during the suspension it was not able to secure "new" work to absorb the continuing overhead expenses. The courts and contract appeal boards support that the only acceptable method for computing unabsorbed overhead is the "Eichleay Method" Information concerning the Eichleay Method can be found in ASBCA 5183, 60-2 BCA 2688.

d. Modification Impact Costs. These are hard to determine and quantify and require a very close examination of the facts of the claim or REA. The Government's position is that the contractor must show that the costs claimed were actually, or will be, incurred as a result of Government action, inaction or pursuant to the circumstances recognized in the contract clauses as entitling the contractor to an equitable adjustment in price or time. There must be some clearly identified and unusual circumstances present before the government can pay costs that are considered to be additional to those already paid in a modification or modifications, in light of the release clause stated therein.

3. Authorities and Responsibilities.

a. Contracting Officer (CO). Has the authority granted by the PARC to decide or settle all claims arising under the contract and to render a final decision when the claim cannot be settled by mutual agreement or alternate dispute resolution (FAR 33.210 and FAR 33.211).

b. Administrative Contracting Officer (ACO). Has the authority granted by the PARC to settle disputes prior to a formal C.O. decision, and REAs arising under the contract if they are within the monetary limits of the warrant. A final decision denying a claim is not under the authority of the ACO. Once a formal C.O. Decision has been issued on a claim, the ACO may not attempt to resolve the dispute without prior direction from the C.O.

c. Disputes Analysis Board (DAB). The DAB has no authority in the claims process. However, it does have the responsibility to review and analyze the claim and to recommend a course of action to the Contracting Officer (FAR 33.204).

4. The Claims Process usually starts with a contractor request for equitable adjustment because of a difference in contract interpretation and ends with a contract modification, a denial of a claim, or an appeal to the ASBCA or the U.S. Court of Federal Claims.

a. Policy.

(1) Typically, a dispute is initiated by the contractor with the Area Office as either a request for equitable adjustment or as a claim. If the claim is over \$100,000 it must include the required certification. If, and when, a request for equitable adjustment is filed as a claim, the same certification requirements apply.

(2) An analysis of a contractor's REA or claim is made at the construction field office level by the Area Engineer and Resident Engineer staff. This analysis is fully staffed with key elements in the resident, area and district offices. The claim or REA is initially assigned by input

into construction automated information systems by field office staff. The office responsible for the action will perform additional updating of claim status; i.e., Area Office or District

Construction Division. When an initial claim is identified and input into construction automated information systems, this information will be provided to the C.O. Once the Government's position is established, the Government communicates its position to the contractor and, if it is not acceptable, the contractor may submit a claim or appeal the C.O. decision.

(3) FAR 33.204 states that the Contracting Officer should have informal discussion with the contractor in an effort to try to resolve the claim. To satisfy this requirement, a Disputes Analysis Board (DAB) is set up.

b. The Disputes Analysis Board (DAB).

(1) When utilized, the DAB consists of five members: a Contracting Office representative, the Resident Engineer, the Area Engineer, the Claims Coordinator from Construction Division, and legal counsel from Office of Counsel. The DAB should also include field personnel who prepared the government project documentation that is used for the evaluation of the claim where applicable. It is the function of the DAB to evaluate the claim - discussing all perspectives including their strengths and weaknesses, and come up with a position addressing the validity of the claim. If the DAB's position is to recommend denial of the claim, the Finding of Fact will be prepared and sent to the contractor asking if there is any additional information the contractor desires to have considered. The Finding of Fact typically includes an offer for a meeting with Government representatives if the contractor so desires. If there is no meeting requested and the contractor provides no additional information, the Contracting Officer's Decision (COD) is drafted and the draft COD is sent to the Contracting Officer for finalizing the COD and issuance of the final decision.

(2) The claim is processed by the District and a Contracting Officer's decision is sent to the contractor which may be appealed to the Armed Services Board of Contract Appeals (ASBCA) or the U.S. Court of Federal Claims.

(3) If, at any time, the Government changes its position or feels it is in the best interest of the Government to do so, it may open negotiations in an effort to settle the dispute without litigation. Negotiations after the COD is issued and prior to litigation will be at the direction of the Contracting Officer.

c. Certification of Claim. Reference FAR 33.207. If the claim is over \$100,000 it must have a certification signed by an officer of the company, stating that the claim is made in good faith,

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the supporting data is complete and accurate, and the amount claimed is that for which the contractor believes the Government is liable.

d. Interest Paid on Claims. Reference FAR 33.208. Interest shall be paid on the amount found due from the date the Government receives the claim (properly certified, if required) or the date payment otherwise would be due, if later, to the date payment is made.



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## FINDINGS AND RECOMMENDATIONS OF THE DISPUTES ANALYSIS BOARD (DAB)

CONTRACT: DACA45-98-C-0528, Unaccompanied Officers Personnel Housing, Lowry AFB, Colorado

CONTRACTORS: ABC Corporation (Prime), DEF Builders (Sub) and GHI Const Co (2nd tier sub via JKL Steel Co)

SUBJECT: Claim 501 - Structural Steel Impact

DAB convened on 9 Feb 1999 in the Denver Resident Office.

DAB members:

Harvey Robinson, Area Engr, Rocky Mtn Area  
Richard Anderson, CSB, RMA  
Rich McRae, Resident Engr, DRO  
Billy Sellin, Const Div NWO  
Tom Faugno, Office of Counsel, NWO

### SUMMARY OF DISCUSSION:

#### Contractor's Claimed Amount:

The claim is in two parts: Part 1 involves GHI Construction Co. claim for \$132,134.45. Part 2 involves DEF claim for \$579,269. ABC's overhead and fee are claimed at \$105,230.32 for a total claimed amount of \$816,633.77. Claim was certified on 6 August 1992 by ABC Corp.

#### Contractor's Claim Position: (LPR Const Co.)

1. Part 1, DEF supplied and installed structural and miscellaneous iron for the project, including steel columns and X-bracing.

2. The structure is a non-self supporting structure by AISC definition and this "was not conveyed by the plans and specification to the contractor." Because of this, the contractor did not provide temporary supports other than "normal cable cross bracing used during steel erection." As a result of this and "thermal movement and from construction loads such as concrete placing and material stacking", the installed steel would move, requiring realigning and replumbing.

3. Because of the thermal movement and the non-self supporting nature of the structure, damages are claimed as increases in labor hours and crane time over what was "bid".

#### Government's Position: (LPR Claim)

1. It is true that by AISC definition, the structure is

indeed non-self supporting. However, the sequence of erection is adequately described by the contractor on page 2 of the contractor's "Executive Summary". The contractor developed an accurate erection sequence from the information on the contract documents. He has, therefore, the responsibility to provide the bracing required to adequately support his construction.

2. The word "owner", used in AISC Code of Standard Practice, para 7.9.3 and 7.9.6 is defined as the Prime Contractor not the Government. It is the Prime contractor's responsibility to coordinate the work of all trades under the contract. This definition is consistent with para 1.2 of the Code.

3. The other item that caused structural movement is "thermal expansion". No matter the type of structure, self supporting or non-self supporting, thermal movement takes place. It is up to the contractor to allow, support or compensate for this movement. The designer is not required to take care of any thermal problems that may be encountered during construction.

#### Contractor's Position (DEF Builders)

1. Part 2 is a claim from DEF Builders Inc, a subcontractor to ABC for the steel stud and drywall work.

2. DEF's claim is that "the lack of temporary guying resulted in substantial movement in the structure until the exterior studs were installed and the diagonal metal strapping installed." This problem is caused by the absence of definition of this as a non-self-supporting structure.

3. DEF was burdened with the costs of reworking construction which could not meet plumb tolerances until the structure was stabilized. This problem was caused by thermal movement of the structure.

4. DEF incurred costs to repair drywall cracking caused by building movement which could have been prevented by rescheduling drywall work after stabilization of temperature.

5. DEF incurred other costs due to numerous unresolved change orders and costs which it had no responsibility.

#### Government's Position: (DEF Builder's claim)

1. As previously stated, the structure is classified as non-self-supporting. However, the omission of that statement from the contract documents did not prevent or prohibit the contractor from constructing the facility in a manner that would support all imposed loads during construction. To blame this movement on the government is ludicrous. The government has no control over the structural movement of the building during construction.

2. The facility is the contractor's to construct. Any and all loads or forces imposed during construction are his to accommodate. The government is not responsible or in a position to dictate erection sequence. If structural movement became a problem, either by thermal or construction imposed loads, it is the contractor's responsibility to correct.

Figure E-2 (Cont'd.)

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3. The contract drawings are very clear in describing the sequence of erection of the structure. There is no evidence that the absence of the words, "this is a non-self-supporting structure", caused any of the movement problems that were encountered. It is the contractor's responsibility to support the structure during erection.

DAB RECOMMENDATIONS:

Based on the position stated above and the fact that any movement of the building during construction is the responsibility of the contractor, it is the recommendation of the DAB that the Contracting Officer deny this claim in its entirety.

Figure E-2 (Cont'd.)



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Contract Support Office

March 9, 1999 Serial No. 376

SUBJECT: Contract DACA45-98-C-0528, Unaccompanied Officers Personnel  
Housing, Lowry AFB, CO.  
(Claim 501 - Structural Steel Impact)

The ABC Corporation  
805 E. Tully Ave., Suite 70  
Denver, CO 80245

Gentlemen:

In response to our certified claim submitted with Serial Letter No. 744-407, dated August 6, 1998, I offer the following:

The Disputes Analysis Board (DAB) met on February 9, 1999 to discuss your claim. The findings and recommendations are enclosed.

Prior to forwarding the DAB recommendations to the Contracting Officer, I invite you to review your claim and advise me if there is any new or additional information that you wish to present.

My target date to forward the DAB recommendations to the Contracting Officer is March 25, 1999. Please submit your new information by that date. If I don't hear from you by March 25, 1999 I will assume that you have no new facts and you wish to have the CO base his decision on the information you have already submitted.

Sincerely,

Matthew Ellis, P.E.  
Authorized Representative  
of the Contracting Officer

Figure E-3

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